IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-374

SAMUEL SLOAN,

Petitioner,

—against—

GERTRUDE J. BONIME, LILLIAN OLDEN, JOHN C. DOYLE, WILLIAM M. WISMER and CANADIAN JAVELIN LTD.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENTS BONIME AND OLDEN IN OPPOSITION

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Questions Presented

1. Was a "tentative settlement class" created in this case?

2. May a plaintiff who was a member of a designated class when an action was commenced and when the class was determined, but by the terms of a settlement reached thereafter will not participate in the settlement fund, continue to act as one of the class representatives?

3. Did the Notice sent to members of the class meet the requirements of Rule 23 of the Federal Rules of Civil Procedure and of due process?

4. Did the District Court have the authority to bar further lawsuits by class members based upon any cause of action arising from the matters alleged in the complaint in this action?

5. Is the class created in this case manageable and maintainable under Rule 23 of the Federal Rules of Civil Procedure?

6. Was the Petitioner entitled to service of any papers beyond those relating to his objections to the proposed settlement?

7. Was the action of the Court of Appeals in deciding the appeal brought by respondent, rather than dismissing the appeal or remanding it to the District Court, an abuse of discretion?

Statement of the Case

By a complaint filed December 3, 1973, plaintiff Bonime, a purchaser of stock of Canadian Javelin Ltd. ("Javelin"), commenced a class action against Javelin and its principal officers, John C. Doyle and William M. Wismer, on behalf of all purchasers of Javelin stock similarly situated during the period of wrongful action alleged in the complaint. Plaintiff Olden was added as a plaintiff on December 11, 1974.

The amended complaint alleged that defendants had disseminated false and misleading statements in violation of Section 10(b) of the Securities Exchange Act of 1934, as amended, and Rule 10b-5 promulgated thereunder, of Sections 17 and 5 of the Securities Act of 1933 and of the common law, and that these false and misleading statements had resulted in the artificial inflation of the market price

of Javelin stock. Plaintiffs sought for themselves and the other members of the class damages resulting from their having purchased Javelin stock at a price substantially higher than what the stock was worth. The class sought consisted of all purchasers of Javelin stock during the period from April 30, 1969 to October 25, 1973.

A motion for class determination was made on January 22, 1975, and the Court certified the class on February 10, 1975, the class certified being the same as that which had been described in the complaint a year earlier.

After pretrial discovery, which consisted of examination of documents, answers to interrogatories and deposition of witnesses, settlement negotiations resulted in the entry into a stipulation of settlement on July 9, 1975, about five months after the class had been certified, and about six months after the motion for class determination had been made.

Pursuant to court order, a notice was sent to all members of the class by mail, and was published in three newspapers of wide circulation in the United States and Canada. It described the class which had been fixed by the Court on February 10, 1975, set forth the nature of the action and the proceedings had to that time, gave a brief summary of the terms of settlement and notified the class members of a hearing to be held on October 17, 1975 to determine whether the proposed settlement should be approved by the Court as fair, reasonable and adequate. The class members were informed that they had the right to "opt out" of the class and the settlement on or before October 7, 1975, the right to object to the settlement on or before September 29, 1975 and, if they did not wish to opt out, the right to enter an appearance in the case through their own counsel. The notice informed the class members that the defendants would pay the settlement fund in cash (although the Stipu-

lation gave them the right to pay either in cash, or partly in cash and partly in stock or warrants), and that one-third of the fund would be distributed to the claimants who purchased between April 30, 1969 and May 31, 1972 (First Class Period) and two-thirds to those who purchased in the period from June 1, 1972 through October 25, 1973 (Second Class Period). The notice also informed the members of the class of the amount of fees which would be sought by plaintiffs' counsel if the settlement were approved.

The notice concluded by stating that the references to the pleadings, settlement agreement and other documents were only summaries, and that for a complete description of the various papers reference was made to the underlying documents, the complete texts of which were on file with the Clerk of the United States District Court for the Southern District of New York, where they were available for inspection and copying.

Petitioner filed a Notice of Appearance dated August 20, 1975, stating his intention to appear at the hearing and seek disapproval of the settlement, a determination that a class action could not be maintained and a dismissal of the complaint with prejudice. In a brief supporting affidavit, Petitioner seemed to base his objections primarily on his concern that he would receive a warrant of little value (although the Notice stated specifically that the settlement fund would be all cash). He also asked that the Court disallow any claim by plaintiffs' attorneys for counsel fees.

Petitioner failed to appear at the hearing to press his objections, and took no further action in this matter, nor did he evince any further interest therein until after entry of the Order and Final Judgment on July 29, 1976, approving the settlement. Meanwhile, the attorneys for the proponents of the settlement had filed affidavits dated October

8, October 9 and October 15, 1975, and two objectors, through their attorneys, had filed papers in opposition. All of these were the subject of lengthy oral presentation to the Court at the hearing on October 17. At the hearing, in addition to oral argument, witnesses were examined and cross-examined, and a few objectors who were present were given full opportunity to make statements of their position.

Thereafter, the attorneys for the two active objectors and the attorneys for the proponents of the settlement exchanged additional affidavits and participated in further arguments before the Court. The objections presented by these objectors dealt with fundamental questions of whether the proposed settlement was fair and whether the procedural steps that had been followed complied with due process.

On June 30, 1976, the District Court rendered an opinion overruling the objections to the settlement and approving the settlement (Petition, pp. 6a-38a), and on July 29, 1976 the Court issued its "Consent Order and Final Judgment" (Petition, pp. 68a-74a).

On October 4, 1976, Petitioner filed a Notice of Appeal from the District Court's order within an extended period granted by the Court, having failed to file within the 30-day period allowed for appeals. His appeal was fully briefed by Petitioner and by the Respondents. Hearing was set for April 6, 1977, at which time the attorneys for the Respondents appeared for argument but the Petitioner failed to appear.

The Court of Appeals affirmed the judgment of the Court below approving the settlement, finding that, on the standards set forth in *State of West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079, 1085 (2d Cir.), *cert. denied sub nom., Cotler Drugs* v. *Chas. Pfizer & Co.*, 404 U.S. 871 (1971), the

evaluation by the District Court of the proposed settlement was plainly sufficient and proper. Thereafter, Petitioner filed a petition for rehearing, with a suggestion that the rehearing be *en banc*. This petition was denied.

Petitioner now asks this Court to review, by Writ of Certiorari, the unanimous decision of the Court of Appeals.

ARGUMENT

POINT I

No "Tentative Settlement Class" Was Established in This Case.

Petitioner devotes approximately a third of the argument portion of his brief to an attack on the alleged adoption in this case of the "Tentative Settlement Class" procedure, charging that it was a violation of due process principles and Rule 23 of the Federal Rules of Civil Procedure (Petition, pp. 20-27). The short answer to his argument is that no such procedure was adopted in this case.

While the Manual for Complex Litigation (§ 1.40) states that "[r]ecent experiences demonstrate that in no event should there be a tentative determination of a class action request for *the purposes of settlement*" (emphasis supplied), it proceeds to state, in footnote 23, that:

> "This statement is not intended to apply to separate prior determination of class members and separate later notices to classes of proposed settlement with provision for subsequent hearing on the fairness of the proposed settlement and with reservation of full power of the court to reject the settlement in whole or in part,"

citing the procedure followed in *State of West Virginia* v. *Chas. Pfizer & Co. Inc.*, 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied sub nom., Cotler Drugs, Inc.* v. *Chas. Pfizer & Co. Inc.*, 404 U.S. 871 (1971).

In the instant case, a motion for class action determination was made on January 22, 1975. The motion was granted on February 10, 1975, and the class was thus determined, as even Petitioner admits, before any settlement negotiations commenced. He gives the commencement date as March 5, 1975 (Petition, p. 8). Actually, settlement was reached on July 9, 1975, about six months after the class was fixed. Obviously, no "tentative settlement class" was ever created, and the determination of the class was never dependent on whether a settlement would be reached.

This was clearly a case where, in the language of the Manual for Complex Litigation quoted above, there was a "separate prior determination of class members" and the notice of proposed settlement provided for "subsequent hearing on the fairness of the proposed settlement" with the Court having full power to reject the settlement, thus at the very least meeting the test of *State of West Virginia* v. *Chas. Pfizer & Co. Inc., supra.*

POINT II

Plaintiff Bonime Was a Proper Class Representative.

While we are reluctant to deal with the many misstatements and the statements not in the record with which the Petition is replete, we deem it necessary to point out that for Petitioner to assert that plaintiff's counsel could have known, when the action was started on December 3, 1973, or when the motion for class certification was filed on January 22, 1975, that Bonime would, in July 1975, under a formula later to be adopted, be unable to claim "dam-

ages," borders on the ridiculous. The complaint was filed on behalf of all purchasers of stock in Javelin from April 30, 1969 through October 25, 1973. Bonime admittedly bought on May 27, 1970 (Petition, p. 14). The class was fixed as all purchasers of the stock in the period from April 30, 1969 through October 25, 1973. Thus, Bonime was a member of the class both when the complaint was filed and when the class was fixed. It was not until a formula for measuring damages was agreed upon and put into the stipulation of settlement, on July 9, 1975, that a determination of whether any particular class member, Bonime or anyone else, would be entitled to share in the settlement fund, could have been made.

In any event, whether under the formula, which fixed particular cutoff dates for the measurement of losses, Bonime can share in the fund, does not affect her right to act as a plaintiff-representative of the class. The ability of a plaintiff to prove the merits of his individual claim or his entitlement to relief is not determinative of his status as representative of the class. *Sosna* v. *Iowa,* 419 U.S. 393 (1975); *Frost* v. *Weinberger,* 515 F.2d 57 (2d Cir. 1975); *Huff* v. *N. D. Cass Company of Alabama,* 485 F.2d 710 (5th Cir. 1973). As was pointed out in *Dorfman* v. *First Boston Corporation,* 62 F.R.D. 466 (E.D. Pa. 1974), for a class representative to have to show damages at the time the class was formed:

> ". . . would mean that before deciding a Rule 23 motion in an action for damages, a court would invariably have to determine whether the putative class representative had himself suffered damages. In other words, an allegation of damages in the complaint would in effect transform a class action motion into a motion for summary judgment as to the representative plaintiff's damages." (62 F.R.D. at 472.)

The cases cited by Petitioner in support of his challenge to Bonime as a class representative (Petition, p. 17) are clearly inapposite.

There is no serious challenge to plaintiff Olden's status, and the fact that Bonime accepted a settlement in which she might not be able to participate shows clearly that she was indeed able to represent the class properly.

Finally, Petitioner supplies no authority for his novel theory that an objector to a settlement has standing to request, not rejection of the settlement, but *dismissal* of an action or any part of it.

POINT III

The Notice to Members of the Class Met the Requirements of Rule 23 of the Federal Rules of Civil Procedure and of Due Process.

Disregarding, as we must, Petitioner's completely unsupported speculation set forth in his Petition (pp. 30-32) as to the percentage of recovery of losses, and his misstatement about whom Judge Lasker permitted to speak at the hearing at which Petitioner was not present (Petition, p. 32), we come to the one basic question he raises: Was the Notice deficient because it did not contain "an estimated range of monetary recovery (e.g., amount per share, per unit, per dollar charged, and the like) that members of the class may expect to receive if the settlement is approved," as the Manual for Complex Litigation suggests?

There was no conceivable way in which the Notice for class members, sent out on August 14, 1975, in which they were told how to submit their claims, could have included that information. Class members were given until January 16, 1976 to file claims. The total fund was fixed—

$1,350,000, less $260,000 or whatever lesser amount the Court would allow as counsel fees—and was set forth in the Notice. But, certainly, on August 14, 1975, and in fact at any time before January 16, 1976, there was no way of knowing or even estimating how many claims would be filed, for what amounts or what portion of the individual claims would be allowed. Without this knowledge, it would have been foolhardy to make any estimated range of monetary recovery that class members could expect to receive if the settlement would be approved.

The objection that the Notice did not set forth what percentage each defendant would contribute to the settlement fund or that Javelin would pay it all, is frivolous. This is a class action, not a derivative action. The concern of the members of the class is that the money be paid into the fund, not its source. If some of the members of the class are also still stockholders of the company and have grounds to object to the company's paying the full amount of the judgment, they have a remedy in a derivative action, but not in this case.

An examination of the Notice (Petition, pp. 54a-63a) shows that it is in full compliance with the required standards, which have been well described in *Grunin* v. *International House of Pancakes*, 513 F.2d 114 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975).

POINT IV

The Court Had the Authority to Bar Further Lawsuits by Class Members Based Upon Causes of Action Arising From the Matters Alleged in the Complaint in This Action.

Petitioner's position that a court, in a class action, cannot enjoin members of the class who have not appeared "and who may not even know about the existence of this action" (Petition, p. 33) from starting suit against the defendants based upon any cause of action alleged in a complaint, if adopted by the Court would seriously lessen the value of class actions, since matters could never be finally put to rest, and would make settlement of such actions all but impossible. The power of courts to enjoin further lawsuits by members of the class where they have received notice of the class action (as they have in this case) is well established. *Berry Petroleum Co.* v. *Adams & Peck*, 518 F.2d 402, 412 (2d Cir. 1975); *Grunin* v. *International House of Pancakes*, 513 F.2d 114, 120 (8th Cir.), *cert. denied*, 423 U.S. 864 (1975).

POINT V

The Class Created in This Case Was "Manageable and Maintainable" Under Rule 23 of the Federal Rules of Civil Procedure.

Petitioner supplies only one basis for his assertion that the class is "unmanageable and unmaintainable," the "lengthy time period over which plaintiffs allege that [the] fraudulent non-disclosures took place" (Petition, p. 28). This period he describes in the fourth of his "Questions Presented" as a period of four and one-half years (Petition, p. 3).

Clearly, a period of this duration not only is manageable, but, as is apparent from Petitioner's failure to supply any factual support for his position, was managed without particular difficulty in this case.

Judge Sneed's concurring opinion in *Green* v. *Occidental Petroleum Corp.*, 541 F.2d 1335, 1342 (9th Cir. 1976), cited by Petitioner, does not deal with the issue he raises.

POINT VI

Petitioner Was Served With All Papers Necessary to Meet the Requirements of Due Process.

It is important to be clear about Petitioner's status. He was not a party to the case, nor did he seek, by intervention, to become a party to the case. He filed objections to the settlement on what he describes as "procedural matters" and inadequate notice (Petition, p. 10) and did not object to the fairness of the settlement. Although he asserted in his Notice of Appearance that he would appear at the hearing on October 17, 1975, by which time the

papers in support of the settlement were on file and available for inspection, and at which time objectors had the opportunity to present their objections and present witnesses to bolster their position, listen to the presentation by proponents of the settlement and attack this presentation to their heart's content, an opportunity which several of the objectors utilized fully, Petitioner chose neither to appear nor to participate. All the papers in the case were on file either in the Office of the Clerk of the Court or in the chambers of the Judge considering the matter, and were available for inspection.

Nothing further was heard from Petitioner, nor was there any indication that Petitioner had any interest in the proceedings, until after the District Court approved the settlement. Even then, during the regular time to appeal, Petitioner was silent. Only after the time to appeal had expired, on July 30, 1976, for the first time since August 1975, did Petitioner evince an interest in the matter, by requesting and receiving an extension of time to file a Notice of Appeal.

He was given full opportunity to present his position to the Appellate Court, and in his brief raised many questions that he had not urged upon the court below. He had the opportunity to make oral presentation to the Appellate Court, but chose not to show up on the date of argument, not bothering to inform the appellees that he would not appear.

Meanwhile, as Petitioner concedes, the objections he urged before the Appellate Court, and now presents, were vigorously and ably urged upon the District Court by an attorney for two other objectors (Petition, p. 11), and, as is apparent from the District Court's decision, were fully considered.

We submit that, in view of these circumstances, the fact that papers were not served upon Petitioner did not constitute a violation of due process.

POINT VII

Since the Judgment of the Lower Court Was a Final Judgment, the Action of the Court of Appeals in Deciding the Appeal, Rather Than Dismissing It or Remanding It to the District Court, Was Proper.

Petitioner now asserts that the Court of Appeals erred because it did not dismiss his appeal (presumably not on the merits) or remand it to the District Court, on the ground that the judgment was not a final judgment on the merits. Despite the reservation of jurisdiction over peripheral matters, the Court of Appeals had before it a final judgment, and proceeded in its determination on that basis.

The procedure followed by the District Court in entering the Order and Final Judgment approving the settlement and dismissing the action while reserving jurisdiction over the effectuation of the settlement and application for counsel fees is the procedure regularly followed by district judges and approved by appellate courts. *State of West Virginia* v. *Chas. Pfizer & Co.*, 440 F.2d 1079 (2d Cir.), *cert. denied sub nom., Cotler Drugs* v. *Chas. Pfizer & Co.*, 404 U.S. 871 (1971); *In re National Student Marketing Litigation*, 68 F.R.D. 151 (10th Cir. 1974). It is the only practical way in which settlements can be consummated, since, until final judgment, parties would be unwilling to take the actions required by the terms of the settlement. To require that the parties undertake the tasks of processing claims, or of holding hearings on disputed claims, before knowing whether a settlement is finally approved, is to place upon them unnecessary burdens, unnecessary because

what are involved are matters peripheral to the basic questions—was the settlement fair, and were the requirements of due process met?

The fact that a lower court reserved jurisdiction to make further orders after judgment makes the judgment no less final. *Baughman* v. *Cooper-Jarrett, Inc.*, 530 F.2d 529, 531 n. 2 (3rd Cir. 1976); *Durkin* v. *Mason & Dixon Lines*, 202 F.2d 425 (6th Cir. 1953); *Kasishke* v. *Baker*, 144 F.2d 384 (10th Cir. 1944).

Since the judgment was final and Petitioner did not withdraw his appeal, the refusal of the Court of Appeals to "dismiss" his appeal or remand the case to the District Court, but instead to proceed to a determination on the merits, was proper.

CONCLUSION

Petitioner has presented no valid reasons why his Writ should be granted. His claim that the Court of Appeals decision is in conflict with the applicable decisions of this Court is without any support in his papers. He fails to state which "applicable decisions" he refers to. His grave charge against the Court of Appeals that it has acted in such a manner as to call for the exercise of this Court's power of supervision (Petition, p. 13), again without a single supporting fact or even argument, is unworthy of attention.

Absent sound reason for review, we must be guided by the words of Chief Justice Taft, commenting on this Court's certiorari jurisdiction, when he said, "[t]he jurisdiction was not conferred upon this court merely to give the defeated party in the Circuit Court of Appeals another

hearing." *Magnum Import Co.* v. *Coty*, 262 U.S. 159, 163 (1923).

For the reasons stated, the petition for a writ of certiorari should be denied.

September 21, 1977

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